No. 15-1262

IN THE

Supreme Court of the United States

PATRICK MCCRORY, Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, AND A. GRANT WHITNEY, JR., Chairman of the North Carolina Board of Elections

Appellants,

v.

DAVID HARRIS & CHRISTINE BOWSER,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

MOTION TO AFFIRM

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QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the three-judge panel correctly found that North Carolina's First Congressional District is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the three-judge panel correctly found that North Carolina's Twelfth Congressional District is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT

This case presents, as the district court below aptly described it, a "textbook" example of racial gerrymandering. *See* J.S. App. 20a. Indeed, the State of North Carolina's efforts to string together disparate black communities from far-flung parts of the state in service of a racial target in Congressional District 1 ("CD1") and Congressional District 12 ("CD12") contravene both the first and latest chapters of the Court's racial gerrymandering jurisprudence.

In *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), the Court analyzed and struck down a predecessor version of CD12 as a racial gerrymander, rejecting the contention that drawing a bizarre, noncompact district so as to maximize its black voter population was "a remedy narrowly tailored to the State's professed interest in avoiding" liability under the Voting Rights Act ("VRA"). *Shaw II*, 517 U.S. at 911. The teaching of those cases appears to have been lost on the State of North Carolina.

For decades since the *Shaw* cases, African-American voters in CDs 1 and 12 had been able to elect their candidates of choice, "[d]espite the fact that African-Americans did not make up a majority of the voting-age population in these earlier versions of CD1 or CD12." *See* J.S. App. 8a. In CD1, the black candidate of choice won each and every election with no less than 59% of the vote. *Id.* at 8a-9a. In CD12, meanwhile, the black candidate of choice won every election between 1992 and 2012 with no less than 55.95% of the vote—and no less than 64% in every election held in the last 16 years. P-69.

In redrawing the congressional map in 2011, however, the North Carolina General Assembly ignored the actual electoral history of these districts. Rather, premised on a fundamental misconstruction of Section 2 of the VRA as described in *Bartlett v. Strickland*, 556 U.S. 1 (2009), and on the Department of Justice's ("DOJ") *1992* objection under Section 5 of the VRA, *see* J.S. App. 32a, the State set out to draw two new majority-minority districts in the apparent belief that doing so would inoculate the State from liability under the VRA. *See* J.S. App. 22a. As a result, the General Assembly increased the black voting age population ("BVAP") of the districts substantially. In CD1, the BVAP was raised from 47.76% to 52.65%. *Id.* at 13a. The BVAP of CD12 was ramped up even more dramatically—from 43.77% to 50.66%. *See id.* The result is unsurprising—black candidates of choice went from winning supermajorities to even larger margins of victory. In 2012, for example, black candidates of choice won with 75.32% and 79.63% of the vote in CDs 1 and 12, respectively.

But contrary to the State's understanding, the VRA is designed to ameliorate and dissipate racial balkanization, not perpetuate it. *See Miller v. Johnson*, 515 U.S. 900, 927-28 (1995) ("It takes a shortsighted and unauthorized view of the [VRA] to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."). Nothing in the VRA compels race-based redistricting where minority voters have effectively "join[ed] forces" with white voters to elect their candidates of choice. *Strickland*, 556 U.S. at 25-26. The State compounded its error, moreover, by seeking to comply with the VRA using a numerical racial threshold unfounded in any evidence,

let alone a "strong basis in evidence." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (citation omitted); *compare* J.S. App. 52a-53a *with Alabama*, 135 S. Ct. at 1271 (finding "strong, perhaps overwhelming, evidence that race did predominate" where a legislature "relied heavily upon a mechanically numerical view" of the VRA).

On October 24, 2013, North Carolina voters filed this action, challenging the constitutionality of CDs 1 and 12 as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. The case went to trial in October 2015. On February 5, 2016, the three-judge panel (the "Panel") issued an opinion finding that CDs 1 and 12 were unconstitutional racial gerrymanders. J.S. App. 56a.

The standard for a racial gerrymandering claim is well established. Plaintiffs must prove race was the "predominant factor" motivating the districting decision in question. *Miller*, 515 U.S. at 916. The burden then shifts to defendants to satisfy strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 976 (1996). On appeal, the Court reviews the district court's factual findings only to determine if they are "clearly erroneous." *Miller*, 515 U.S. at 917.

Under these standards, the appeal fails to raise a substantial federal question. The Panel had ample evidence to support its conclusions—including direct admissions of race-based intent by the plan's legislative architects and the mapdrawer, corroborating testimony by the incumbents of CDs 1 and 12, and ample circumstantial evidence of the type relied on by the Court time and again in its racial gerrymandering jurisprudence.

It is thus hardly a surprise that Appellants do not even attempt to address the vast majority of the evidence the Panel relied on to support its ultimate holdings—including the stark and compelling direct evidence of the General Assembly's racial motives. Such an effort would only have demonstrated its futility. Contrary to Appellants' mischaracterizations, the Panel's careful and thoughtful opinion is rooted in the Court's jurisprudence and well-supported by the factual record. The Court should summarily affirm.

I. RACE WAS THE PREDOMINANT FACTOR IN DRAWING CDs 1 AND 12

A. The Panel's Findings as to CD1 Are Not Clearly Erroneous

Appellants do not dispute that in constructing the enacted plan, the State placed a large number of voters within or without the boundaries of CD1 because of their race, and that this directly impacted the construction of the district. This is the very definition of racial predominance. *See Miller*, 515 U.S. at 916.

1. Direct Evidence Demonstrates that Race Predominated in CD1

In finding racial predominance in CD1, the Panel pointed to the "extraordinary amount of *direct* evidence" demonstrating that the General Assembly used a "racial quota" to construct CD1, which then "operated as a filter through which all line-drawing decisions had to pass." J.S. App. 20a-21a (emphasis in original). Indeed, the Panel found that "[i]t cannot seriously be disputed that the predominant focus of virtually every statement made, instruction given, and action taken in connection with the redistricting effort was to draw CD1 with a BVAP of 50 percent plus one

person." *Id.* at 28a. Indeed, Appellants here do not seriously dispute the Panel's finding of racial predominance in CD1, failing to so much as mention, let alone contest, the evidence on which that conclusion was based.

First, and most obviously, the mapdrawer, Dr. Thomas Hofeller, confirmed that the plan architects, Senator Rucho and Representative Lewis, instructed him to—and he did—draw CD1 as a majority-BVAP district. *See* J.S. App. 23a. Dr. Hofeller was instructed that turning CD1 into a majority-BVAP district was nonnegotiable and that he "had no discretion to go below 50-percent-plus-one-person BVAP." *Id.* at 25a (citing Tr. 621:3-622:19). That is, Dr. Hofeller was instructed that he could take other considerations into account in drawing CD1 only if the "net result" was a majority-BVAP district. *Id.* at 24a (citing Tr. 621:3-622:19).

The legislative record is "replete with statements" by the plan's architects that CD1 was a "VRA district" that had been drawn purposefully to achieve a predetermined racial target. *See* J.S. App. 21a-22a. The architects stated that CD1 "was drawn with race as a consideration," that CD1 "must include a sufficient number of African-Americans so that [CD1] can re-establish as a majority black district," and that they consciously "elected to draw the VRA district at 50 percent plus one" BVAP. *Id.* (citations omitted). *Compare Alabama*, 135 S. Ct. at 1271.

Citing the State's purported obligations under the VRA, Rucho and Lewis issued multiple public statements reiterating that race predominated in the construction of CD1. *See* J.S. App. 22a-23a. For example, the statement accompanying the release of the 2011 Congressional Plan read:

> [T]he State is now obligated to draw majority black districts with true majority black voting age population. Under the 2010 Census, the current version of the First District does not contain a majority black voting age population.
>
> . . . .
>
> Because African-Americans represent a high percentage of the population added to the First District . . . we have . . . been able to re-establish Congressman Butterfield's district as a true majority black district.

P-67 at 3-4.

Because the mapdrawer was directed to draw CD1 as a majority-minority district as his top priority, he necessarily placed a substantial number of voters within or without CD1 based on their race. For instance, when asked whether he moved into CD1 a part of Durham County that was "the heavily African-American part" of the county, he responded simply, "Well, it had to be." Tr. 640:7-10; *see also* J.S. App. 24a.[1]

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[1] *See also* Tr. 570:24-571:7 ("With the exception of Greene County, the percentage of the African-American population outside [CD1] was lower than the percentage inside the district, which is exactly what you would think would be the case since the district we're talking about is an *African-American majority district*") (emphasis added); Tr. 542:11-24 ("[I]f you build a minority district in a group of counties and . . . only part of some of the counties are in the minority district, than it's *completely logical* that the portions . . . of the counties that are in the minority district, which in this case would be District 1, would have a much higher number of minority residents . . . in them than the portion outside the district.") (emphasis added).

Moreover, Dr. Hofeller candidly acknowledged that "it wasn't possible to adhere to some of the traditional redistricting criteria in the creation of [CD1]" because "the more important thing was to . . . follow the instructions that [he had] been given by the two chairmen" to draw the district as majority BVAP. J.S. App. 21a (citation omitted). Indeed, the mapdrawer and the plan architects conceded that traditional redistricting criteria were subordinated to the singular pursuit of drawing CD1 as a majority-BVAP district. *See id.* 26a. Among other things, "Hofeller testified that he would split counties and precincts when necessary to achieve a 50-percent-plus-one-person BVAP in CD1," and Rucho and Lewis acknowledged that "[m]ost of our precinct divisions were prompted by the creation of . . . [the] majority black First Congressional District," *see id.* at 26a-27a (citations omitted).

The direct evidence here is precisely "the kind[] of direct evidence [the Court has] found significant in other redistricting cases." *Easley v. Cromartie*, 532 U.S. 234, 254 (2001) ("*Cromartie II*") (citing *Bush v. Vera*, 517 U.S. 952, 959 (1996) "(State conceded that one of its goals was to create a majority-minority district)"; *Miller*, 515 U.S. at 907 "(State set out to create majority-minority district)"; *Shaw II*, 517 U.S. at 906 "(recounting testimony by Cohen that creating a majority-minority district was the 'principal reason' for the 1992 version of District 12)").

2. Circumstantial Evidence Demonstrates that Race Predominated in CD1

The tale told by the direct evidence is borne out by the circumstantial evidence. The General Assembly's overriding racial goals manifest in the configuration of CD 1.

Dr. Hofeller did not consider measures of compactness in drawing CD1 and, in fact, substantially reduced the compactness of CD1. J.S. 27a. This is plain on the face of the district.[2] CD1 ignores compactness precisely because Dr. Hofeller constructed a district whose grasping tendrils were necessary to capture disparate pockets of black voters.

Additionally, when it was necessary for Dr. Hofeller to split counties to achieve a BVAP majority in CD1, he did so. *See* Tr. 629:17-630:1. Dr. Hofeller constructed CD1 from 5 whole counties and pieces of an additional 19 counties. CD1 also splits a total of 21 cities and towns. See D-82 at 15-16, ¶¶ 45, 47 (Hofeller Report); Tr. 278:5-14. By contrast, the benchmark version of CD1 split only 10 counties and 16 cities and towns. D-82 at 15-16, ¶¶ 45, 47.

In the pieces of 19 split counties that are included in CD1, Dr. Hofeller assigned citizens to districts on the basis of race. For example, the BVAP in the portion of Beaufort County in CD1 (52.19%) is two-and-a-half times greater than the BVAP in the portion in Congressional District No. 3 (20.56%). P-106; *see also* P-71, ¶ (1)(a)(xiv), (xviii).

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[2] A map of CD1 is provided in Appendix A.

Similarly, when it was necessary for Dr. Hofeller to split precincts to achieve a BVAP majority in CD1, he did so. *See* Tr. 629:17-630:1. The plan architects announced that most "precinct divisions were prompted by the creation of Congressman Butterfield's majority-black First Congressional District." P-7. It is thus not surprising that these precincts were split along racial lines with far more black voters assigned to CD1 than to the adjoining districts. P-106; *see also* P-71, ¶ (1)(a)(xiv), (xviii).

The Court has recognized that redistricting "is one area in which appearances do matter." *Shaw I*, 509 U.S. at 647. And the appearance of CD1 manifests its singular racial purpose. Like the original *Shaw* district, CD1 "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." *Id.* Like the original *Shaw* district, CD1 "bears an uncomfortable resemblance to political apartheid." *Id.*

3. Appellants Offer No Coherent Argument as to Why the Panel's Findings Were Clearly Erroneous

In the face of this mountain of evidentiary support for the Panel's predominance finding as to CD1, Appellants offer only a few half-hearted arguments.

First, Appellants assert that "the North Carolina General Assembly used other criteria besides equal population and race to construct CD1." J.S. 28. They provide no citation for this assertion, however, either to the record below or to the "Factual Background" portion of their brief. This is not an oversight. Appellants attempted a similar "passing argument"

below (which they abandon here), arguing that partisan advantage drove CD1. J.S. App. 27a. The Panel rejected this argument, as Appellants "proffer[ed] no *evidence* to support such a contention." *Id.* (emphasis in original). Here, Appellants point to no evidence that any factor other than equal population and race even informed, let alone predominated in, the redistricting of CD1.

Second, Appellants complain that the Panel merely "*presumed* racial predominance as to CD1 based solely on the fact that the State drew CD1 at the 50% BVAP level to foreclose vote dilution claims under Section 2." J.S. 28. There are several fatal flaws with this argument.

As an initial matter, the Panel did not "presume" anything. It based its predominance finding on the same kind of evidence the Court found to be "strong, perhaps overwhelming, evidence that race did predominate" in drawing an Alabama senate district. *Alabama*, 135 S. Ct. at 1271. As in *Alabama*, (1) the mapdrawer understood that the primary redistricting goal was to achieve a precise racial percentage in CD1, *compare id. with* J.S. App. 21a-23a; (2) CD1 became significantly less compact, *compare Alabama*, 135 S. Ct. at 1271 *with* J.S. App. 27a; (3) black voters were disproportionately added to CD1 while white voters were disproportionately excluded, *compare Alabama*, 135 S. Ct. at 1271 *with* J.S. App. 24a; (4) counties, cities, towns, and precincts were split along racial lines, *compare Alabama*, 135 S. Ct. at 1271 *with* J.S. App. 26a-27a *and* P-6, P-71; and (5) the mapdrawer achieved his professed racial target, *compare Alabama*, 135 S. Ct. at 1271, *with* J.S. App. 23a. Appellants' gross over-simplification of the basis of the

Panel's decision is belied by the Panel's extensive, undisputed factual findings.

Further, Appellants' contention manifests their basic misunderstanding of the VRA. Appellants contend that racial predominance "cannot be established where a legislature . . . created a majority black district to comply with federal law." J.S. 28. That is not the law. While the appropriate use of race to comply with the VRA may satisfy strict scrutiny, J.S. App. 18a, a state cannot invoke the VRA as an "automatic" means of refuting racial predominance. The Court has repeatedly upheld findings of racial predominance where race-based districting decisions were made in purported service of the VRA. *See, e.g.*, *Shaw II*, 517 U.S. at 904-05 (strict scrutiny applies "whether or not the reason for the racial classification is benign or the purpose remedial"); *Bush*, 517 U.S. at 957 (same, where districts were drawn "with a view to complying with the [VRA]"); *Miller*, 515 U.S. at 907 (same, where goal was to gain Section 5 preclearance); *Shaw I*, 509 U.S. at 655 (no "*carte blanche* to engage in racial gerrymandering in the name of" VRA compliance). Appellants' claim that attempted compliance with the VRA immunizes race-based redistricting decisions from racial gerrymandering claims baldly defies the Court's racial gerrymandering jurisprudence.

To be sure, there can be circumstances where a state draws a majority-minority district without triggering strict scrutiny. For example, a state might draw such a district as a natural result of complying with traditional redistricting principles. But this is not such a case. Rather—just like *Shaw*—it is a case where North Carolina's myopic pursuit of a "maximization" policy led it to disregard traditional

redistricting principles and to place a substantial number of voters within and without a district because of the color of their skin.

If this is not racial predominance, nothing is.

B. The Panel's Findings as to CD12 Are Not Clearly Erroneous

The Panel's factual determination that race predominated in CD12 is also well supported by direct and circumstantial evidence and is not clearly erroneous. *See* J.S. App. 30a-44a.

1. Direct Evidence Demonstrates that Race Predominated in CD12

The BVAP in CD12 was ratcheted up from 42.31% under the 2001 Congressional Plan to 50.66% under the 2011 Congressional Plan—an increase of *more than eight percentage points*. P-69, P-111. As with CD1, the Panel drew on ample direct evidence that this dramatic increase in BVAP (to just over 50%) was not mere happenstance and, in fact, was the predominant purpose behind CD12.

First, Mel Watt, who represented CD12 in 2011, "testified at trial that Senator Rucho himself told Congressman Watt that the goal was to increase the BVAP in CD12 to over 50% . . . 'to comply with the [VRA].'" J.S. App. 33a (quoting Tr. 108:23-109:1). The Panel, "[b]ased on its ability to observe firsthand Congressman Watt . . . credited his testimony and [found] that Senator Rucho did indeed explain to Congressman Watt that the legislature's goal was to 'ramp up' CD12's BVAP." *Id.* at 34a-35a. Gauging witness credibility is a classic prerogative of the trial court and "can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575

(1985). Appellants, meanwhile, chose not to call Rucho to testify, despite the fact that he was listed as a witness and present at trial. J.S. App. 34a.[3]

Second, consistent with Watt's testimony, Rucho and Lewis issued a public statement emphasizing the racial purpose behind CD12. This statement indicated that "[b]ecause of the presence of Guilford County in the Twelfth District [which was covered by Section 5 of the VRA], we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." P-67 at 5. *Compare Alabama*, 135 S. Ct. at 1271 (finding strong evidence of racial predominance where "[t]he legislators in charge of creating the redistricting plan believed . . . that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

Appellants dismiss this statement as an "isolated reference[ ] to 'black' population" akin to the paltry direct evidence of racial motivation discussed in *Cromartie II*. J.S. 25. It is not an apt comparison. The *Cromartie II* Court was unpersuaded by a single reference in the record to "Black community" because "[i]t [did] not discuss why Greensboro's African-American voters were placed in the 12th District" and was "addressed only to two members of the legislature." 532 U.S. at 254.

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[3] Perhaps cognizant that this race-based goal lacked justification, Senator Rucho "seemed uncomfortable" knowing that it was his job "to go out and justify that [redistricting goal] to the African-American community" and "convince the African-American community that that made sense." J.S. App. 34a (quoting Tr. 109:2-3, 136:5-9).

The statement here stands in sharp contrast. It explains that the reason for increasing the BVAP above a racial target was the pursuit of preclearance under Section 5, was announced in a press release by its sponsors as a justification for the plan, and suggests that the General Assembly's (mistaken) attempts at VRA compliance were the driving factor behind *both* of the new majority-minority districts. Moreover, the architects' statement here is bolstered by the mapdrawer's admission that he was instructed to move black residents of Guilford County into CD12 because of their race. J.S. App. 38a-39a. Far from an "isolated reference" to race, this evidence reinforces the consistent narrative told by the direct evidence of the predominant role of race in drawing CD12.

Third, the State's preclearance submission confirms that, in drawing CD12, "[o]ne of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the state to create a second majority minority district," that the State "drew the new CD12 based on these considerations," and emphasized that by increasing the BVAP of CD12 from 43.77% to 50.66%, the enacted plan "maintains, and in fact increases, the African-American community's ability to elect their candidate of choice in District 12." J.S. App. 32a-33a (citations omitted); *see also* P-68 at 15 (stating that the General Assembly drew "District 12 as an African-American . . . district that has continually elected a Democratic African American since 1992" and that CD12 had been drawn to protect "African-American voters in Guilford and Forsyth").

The significance of this submission cannot be overstated. The 1992 DOJ objection drove the enactment of the original *Shaw* district, which the Court struck down as a racial gerrymander in *Shaw II*. The State's suggestion that Section 5 of the VRA somehow compelled the redrawing of CD12 as a majority-minority district not only adopts DOJ's "max-black" approach the Court "handily rejected in *Miller*," J.S. App. 33a (citing 515 U.S. at 921-24), it also confirms the State's efforts to reconstruct the original racial gerrymander of CD12.

Appellants do not even mention Watt's testimony or the State's preclearance submission, let alone argue that the Panel's findings based on this evidence were clearly erroneous. This compelling direct evidence shows that the General Assembly placed a substantial number of voters within CD12 based predominantly on racial considerations. *Alabama*, 135 S. Ct. at 1267.

2. Circumstantial Evidence Demonstrates that Race Predominated in CD12

Again, the direct evidence of racial predominance is supported by circumstantial evidence. The barest glance at CD12 reveals that it cannot be explained by traditional criteria.

CD12, the least compact district in the State, "is a 'serpentine district [that] has been dubbed the least geographically compact district in the Nation.'" J.S. App. 35a (quoting *Shaw II*, 517 U.S. at 906). In redrawing CD12 in 2011, Dr. Hofeller managed to reduce the compactness of CD12 even further. *Id.* 35a-36a. *Compare Alabama*, 135 S. Ct. at 1271

(describing irregular district boundaries as evidence of racial predominance).[4]

CD12 is constructed from pieces of six counties: Mecklenburg, Cabarrus, Rowan, Davidson, Forsyth, and Guilford. A thin line of precincts running through Cabarrus, Rowan and Davidson counties connects black population centers in Mecklenburg (Charlotte), Forsyth (Winston-Salem), and Guilford (Greensboro). CD12 splits 13 cities and towns. P-17, ¶ 17 (Ansolabehere Report).

There is no dispute that these county divisions fall along racial lines. Specifically:

- Mecklenburg County: The BVAP in the portion of the county in CD12 (51.76%) is more than three times the BVAP in the portion of the county in CD9 (14.22%). P-107; *see also* P-71, ¶ (1)(a)(xiv), (xviii).
- Forsyth County: The BVAP in the portion of the county in CD12 (70.58%) is almost four times the BVAP in the portion of the county in CD5 (18.44%). P-107; *see also* P-71, ¶ (1)(a)(xiv), (xviii).
- Guilford County: The BVAP in the portion of the county in CD12 (58.18%) is almost four times the BVAP in the portion of the county in CD6 (15.21%). P-107; *see also* P-71, ¶ (1)(a)(xiv), (xviii).

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[4] A map of CD12 is provided in Appendix B. Appellants take issue with the Panel's description of CD12 as "serpentine," J.S. 21, but this term comes directly from *Shaw I* and only highlights the similarities between CD12 as enacted in 1991 (and later struck down) and CD12 as enacted in 2011. *See* J.S. App. 35a.

Thus, the circumstantial evidence of CD12's "shape and demographics," *see Miller*, 515 U.S. at 916, fully supports the Panel's conclusion that the General Assembly subordinated traditional districting criteria to racial considerations in crafting CD12.

3. Political Considerations Were Subordinated to Race

Appellants refute none of the evidence outlined above. Instead, Appellants erroneously complain that the Panel "ignored" evidence that "politics completely explained CD12." J.S. 20. Quite the contrary, the Panel considered Appellants' "politics" arguments. It just found them unconvincing in light of the record. *See* J.S. App. 38a ("[T]he Court is not persuaded that the redistricting was purely a politically driven affair" with respect to CD12). After detailing the compelling direct and circumstantial evidence, the Panel turned to Appellants' "politics not race" argument, concluding that it "was more of a post-hoc rationalization than an initial aim." *Id.* at 40a. This conclusion is well supported by the record and is not clearly erroneous.

Appellants' evidence of political motivation rests almost entirely on Dr. Hofeller's testimony, which the Panel carefully considered and determined was not credible. *See* J.S. App. 37a-39a; *see also Anderson*, 470 U.S. at 575 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

Specifically, the Panel noted how Dr. Hofeller's deposition testimony that he actively considered race in drawing CD12 for purposes of Section 5 compliance was inconsistent with his trial testimony that he did not use race to draw CD12. J.S. App. 38a-39a. The Panel was appropriately dubious of Dr. Hofeller's claim that he did not consider racial data in light of both his experience as the staff director to the U.S. House Subcommittee on the Census and his own testimony about the alleged importance under Section 5 of reuniting the black community of Guilford County in CD12. *Id.* at 39a & n.9. Appellants do not even try to explain these inconsistencies or offer the Court any reason to believe the Panel's credibility determination was clearly erroneous.

The Panel further noted that, in their press release, the plan's architects "themselves attempted to downplay the 'claim[] that [they] have engaged in extreme political gerrymandering" as "'overblown and inconsistent with the facts.'" J.S. App. 39a (quoting P-68 at 1). (In a press release issued just days earlier, meanwhile, the architects made sure to emphasize the district's BVAP increase in purported service of the VRA. *See* P-67.) The State cannot have it both ways—disclaiming partisan motives while seeking refuge in the VRA during the legislative process, and then disclaiming racial considerations and embracing partisan gerrymandering during litigation. It is hardly clear error for the Panel to take the architects' public statements at face value.

Unable to show that the Panel's factual findings are clear error, Appellants next claim legal error based on *Cromartie II*. According to Appellants, regardless of the direct evidence of racial predominance, racial gerrymandering plaintiffs are "required" to proffer

circumstantial proof in the form of "alternative plans which would have achieved the legislature's" purported political objectives. J.S. 22. But, as the Panel found, J.S. App. 42a-43a, Appellants' reliance on *Cromartie II* is misplaced. In *Cromartie II*, the Court considered a record nearly devoid of evidence that race was considered in drawing a district, and overwhelming evidence "articulat[ing] a legitimate political explanation for [the state's] districting decision." 532 U.S. at 242. There, the General Assembly had redrawn the district to drastically *reduce* its BVAP—from the majority-minority district struck down in *Shaw II* to a 43% BVAP district. *See Hunt v. Cromartie*, 526 U.S. 541, 544 (1999).

As the Panel found, *Cromartie II* bears scant resemblance to the record here, where "at the outset district lines were admittedly drawn to reach a racial quota" and "political concerns" were then "noted at the end of the process." J.S. App. 43a. Rather than a threshold requirement of proof, an alternative plan offers persuasive evidence "*[i]n a case such as*" *Cromartie II*, 532 U.S. at 258 (emphasis added), where plaintiffs' claim rests almost entirely on circumstantial evidence from which either a racial motivation or a political motivation could be inferred. Nothing in *Cromartie II* instructs district courts to disregard persuasive evidence of racial predominance for lack of an alternative plan.[5] The Panel thus appropriately

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[5] Indeed, Appellants' suggestion that an alternative map is a threshold requirement where race and party correlate runs counter to the Court's well-established rule that states may not use race as a proxy for political affiliation. *See Bush*, 517 U.S. at 968 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."); *Miller*, 515 U.S. at 920 ("[W]here the State assumes from a group of voters' race that they 'think alike, share the same

considered the evidence presented in *this* case, weighed it, and made well-supported factual findings fatal to Appellants' litigation position.

Finally, Appellants' attack on Appellees' experts' conclusions that race better explained the boundaries of CD12 than did politics fails for several reasons.

As an initial matter, the Panel's predominance finding in CD12 hardly turned on Appellees' experts, who merely offered additional circumstantial evidence supporting the compelling direct and circumstantial evidence set out above. *See* J.S. App. 42a. More to the point, Appellants cannot establish that the Panel committed clear error by positing that the Panel should have credited their expert's testimony instead of Appellees'. The Panel, again, is in a unique position to make credibility determinations. *See Anderson*, 470 U.S. at 575. And it considered and rejected all the attacks on Appellees' experts that Appellants offer here. *See* J.S. App. 40a-42a.

Appellants' criticisms of the experts' analysis, moreover, miss the mark. Appellees' expert Dr. Peterson, on whose testimony the Court heavily relied in *Cromartie II*, 532 U.S. at 251-52, concluded, on the strength of a boundary segment analysis, that "race 'better accord[ed] with' the boundary of CD12 than did politics." J.S. App. 40a-41a. Appellants' suggestion that Dr. Peterson's analysis fails for his failure to

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political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates.'") (quoting *Shaw I*, 509 U.S. at 647). If plaintiffs were required to provide an alternative map disentangling race from party wherever the two variables coincide, the Court's prohibition on the use of race as a proxy for partisanship would be meaningless.

ascribe a particular motive to the mapdrawer misunderstands the nature and limits of circumstantial evidence. *See* Tr. 234:2-3 (Dr. Peterson: "What I'm looking at is an effect. I'm not opining as to why that happened the way that it did."); *see also Circumstantial Evidence*, *Black's Law Dictionary* (10th ed. 2014) (defining "circumstantial evidence" as "[e]vidence based on inference and not on personal knowledge or observation"). Despite Appellants' mischaracterization of Dr. Peterson's analysis as a "tie," J.S. 23, they do not dispute the Panel's description of Dr. Peterson's results, which demonstrated that the racial imbalance was "more pronounced" than the political imbalance, J.S. App. 41a.

Dr. Ansolabehere, meanwhile, used a different methodology to similarly conclude that the changes to CD12 "can be only explained by race and not party." J.S. App. 41a (quoting Tr. 314, 330:10-11). Appellants complain that Dr. Ansolabehere's reliance on voter registration figures somehow flouts *Cromartie II*'s "clear and binding precedent." J.S. 27. But *Cromartie II* did not create a legal rule banning consideration of voter registration figures in all racial gerrymandering cases. Rather, it relied on the available evidence to conclude that, *on that record*, evidence of voting registration was "inadequate" to predict voter preference. 532 U.S. at 245-46 (citing deposition transcripts and appendix). The record evidence in *this* case is different. Dr. Ansolabehere analyzed present conditions to find that "[r]egistration is highly correlated with actual election results in the State of North Carolina." P-18, ¶ 31. Indeed, Dr. Ansolabehere concluded that registration was a *better* predictor of electoral behavior than other available data, and one that allowed for more granular analysis of the "race or party" question. *Id.* ¶¶ 14-20; Tr. 307:4-309:16.

Appellants' suggestion that North Carolina courts are forever bound by the factual record as paraphrased by the Court fifteen years ago disregards both common sense and common law. *See, e.g.*, *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (requiring voting rights legislation to be considered in terms of "current conditions").

Indeed, Appellants themselves have relied on voter registration as a predictor of political preference when it suits them. For instance, in their July 19, 2011 press release, the plan's architects defended against criticism that the map was drawn to advantage Republicans by pointing to the number of registered Democrats across all districts. *See* J.S. App. 42a (citing P-68 at 2). Their outside counsel similarly instructed that "registration advantage is the best aspect to focus on to emphasize competitiveness, [as] [i]t provides the best evidence of pure partisan comparison." J.S. App. 40a (quoting P-13). Likewise, in their briefing below, Appellants touted voter registration figures to defend the General Assembly's remedial plan against the attack that it is a partisan gerrymander. ECF No. 159 at 18. Appellants' endorsement of the use of voter registration data when it suits their needs undermines their attack on Appellees' expert's use of voter registration data as reversible error.

In short, Appellants cannot establish that the Panel's factual findings are clear error—nor distort those factual findings as legal error—merely by expressing their disagreement with the inferences fairly drawn by the Panel from the record evidence.

II. CD1 AND CD12 CANNOT SURVIVE STRICT SCRUTINY

A. The General Assembly Had No Strong Basis in Evidence to Support the Race-Based Redistricting of CD1

The Panel's conclusion that the General Assembly's predominant use of race in CD1 was not narrowly tailored to a compelling government interest is also well supported in the record evidence.

Appellants maintain that CD1 is narrowly tailored to the State's compelling interest in foreclosing a claim under Section 2 of the VRA. *See* J.S. 20, 31. In the districting context, no liability under Section 2 of the VRA can inure in the absence of the three "*Gingles*" preconditions: (1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single member district"; (2) that the group "is politically cohesive"; and (3) that a "white majority votes sufficiently as a bloc" such that it can "usually . . . defeat the minority's preferred candidate." J.S. App. 47a (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993) (citation omitted)).

The Panel concluded that CD1 failed strict scrutiny because Appellants failed to establish the third *Gingles* factor—that a "white majority was *actually* voting as a bloc to defeat the minority's preferred candidates." *Id.* at 50a-51a (emphasis in original). For good reason: "CD1 has been an extraordinarily safe district for African-American preferred candidates of choice for over twenty years." *Id.* at 53a. African-American preferred candidates—without fail—"easily and repeatedly" won reelection even though "African-Americans did not make up a majority of the voting-age population in CD1." *Id.* Nonetheless, the General

Assembly ratcheted up the BVAP of CD1 from 47.76% to 52.65%. *Id.*

It is undisputed that the General Assembly did no analysis to determine whether a 50%-plus-one BVAP threshold was compelled under the VRA. *See id.* at 49a. But Appellants contend nonetheless that the General Assembly had before it "voluminous" evidence of "high levels of racially polarized voting" in CD1. J.S. 13-17. To put it mildly, Appellants are mischaracterizing the record. On scrutiny, the elaborate garb (no less than eight enumerated paragraphs!) with which Appellants have clothed their argument in fact reveals a decidedly naked emperor.

First, Appellants—without citation—state that "no one previously had questioned the existence of high enough levels of racially polarized voting to justify CD1 as a district required by the VRA." J.S. 13. But CD1 had not been a majority-BVAP district in the two decades since 1996. To be sure, no one questioned a state of affairs that did not exist.

Second, Appellants point to legislative testimony in which an NAACP representative spoke generally of the continued existence of racially polarized voting in North Carolina, but did not address CD1 or suggest that CD1 needed to be majority-BVAP. *See generally* D-5.6. Relatedly, Appellants point to an expert report by Dr. Ray Block, implying that Dr. Block found a high degree of racially polarized voting in CD1, with "non-blacks consistently vot[ing] against African American candidates." J.S. 14 (quoting D-5.8). Appellants profoundly mischaracterize this report, which is about North Carolina as a whole, and contains only one data point regarding CD1, which *directly contradicts* Appellants' position. Dr. Block did not conclude that African Americans would be unable to elect their

candidates of choice in CD1 unless the district was transformed into a majority-BVAP district. To the contrary, according to Dr. Block's analysis of the 2010 election in CD1, more than *59% of whites* voted for Representative G.K. Butterfield, the black candidate of choice. D-5.8 at 7. The fact that a majority of whites voted for the black candidate of choice dooms—not supports—Appellants' position.[6]

Third, Appellants discuss Dr. Brunell's analysis, which is not a racially polarized analysis of CD1 but, rather, a generalized assessment of the degree to which black voters supported black candidates in North Carolina counties. *See generally* D-5.10. Dr. Brunell conducted no analysis of the degree of white crossover voting in CD1, or whether whites

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[6] *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 438-39 (S.D.N.Y. 2004) (rejecting an "analysis [that] examines racially polarized voting without addressing the specifics of the third *Gingles* factor, which requires white majority bloc voting that usually defeats the [minority]-preferred candidate") (emphasis omitted), *aff'd* 543 U.S. 997 (2004); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1236-37 (C.D. Cal. 2002) (third *Gingles* prong not established where more than 50% of whites voted for Latino candidates in some races, and Latino candidates won in other districts with less than 50% of the white vote), *aff'd*, 537 U.S. 1100 (2003); *Page v. Bartels*, 144 F. Supp. 2d 346, 365 (D.N.J. 2001) (rejecting Section 2 claim under third *Gingles* prong where more than half of voters would vote for the candidate preferred by African-American voters); *Quilter v. Voinovich*, No. 5:91-CV-2219, 1992 WL 677145, at *4 (N.D. Ohio Mar. 19, 1992) ("[T]he white crossover vote for black legislative candidates was very substantial, usually more than 50%. Such voting is not legally significant racial bloc voting; rather, it is coalitional voting, and this coalition of black and white voters is the target of the Board's plan. The [VRA] was not designed to serve the purpose of preventing coalitional black and white voting.") (footnotes omitted.

could (or ever had) voted as a bloc to defeat the minority candidate of choice in CD1. *See id.* Dr. Brunell's report is thus an assessment of the second *Gingles* factor—black voting cohesion—rather than the third *Gingles* factor. To the extent Dr. Brunell's analysis even touches on the third *Gingles* factor, it suggests a high degree of white crossover voting in at least some areas encompassed by CD1. *See, e.g.*, D-5.10 at 7 (estimating more than 50% of whites in Durham County voted for black presidential candidate of choice in 2008).

It is for this reason that the Panel considered this evidence and found it wanting. *See* J.S. App. 49a-50a. As the Panel explained, the "generalized" Block and Brunell reports (1) did not relate specifically to CD1 and (2) did not demonstrate that a white majority usually voted as a bloc to defeat African Americans' candidates of choice. *Id.*

Fourth, Appellants assert that "voluminous lay testimony established the existence of racially polarized voting sufficient to treat CD1 as a continuing VRA district." J.S. 15 (citing D-36 through D-56). Again, this is a gross mischaracterization. In the 20 exhibits Appellants cite, not a *single person* testified that racially polarized voting existed as to CD1 or urged the General Assembly to transform CD1 into a majority-BVAP district. Indeed, in the many pages of transcripts that comprise these exhibits, CD1 is mentioned only once, with a witness informing the General Assembly: "[A]s it related to [the] First Congressional District . . . I don't want to see the packing going on" so as to "create another minority district, but lessen" the opportunity for minority candidates of choice to be elected in surrounding districts. D-54 at 42:11-20.

Fifth, Appellants contend that "Professor Irving Joyner, representing the NC NAACP, affirmed that racially polarized voting continues to exist in North Carolina." J.S. 15 (citing D-41). Not only is the evidence supporting Appellants "fifth" piece of evidence redundant with their "fourth" piece of evidence, but Professor Joyner in fact said precisely *nothing* about CD1. Instead, he stated that while there continued to be some degree of racially polarized voting in the State as a whole, "we are at a point now where people across racial lines are coming together to vote for the best candidate of their choice," and decried the General Assembly's redistricting as manifesting an unconstitutional "max black" approach in which "African-Americans have been packed and bleached out from the surrounding districts of other African-Americans." D-41 at 70:22-70:25, 74:14-20.

Sixth, Appellants note written testimony submitted by Professors Michael Crowell and Bob Joyce. J.S. 15-16. This testimony concerned *legislative* redistricting; it did not address *congressional* districting in general or CD1 in specific. Contrary to Appellants' characterization, the professors did *not* state that "majority minority districts should still be established in the counties at issue in *Gingles*, including those encompassed by prior versions of CD1." *Id.* Rather, they stated that although *Gingles* had never been overruled, "North Carolina has changed significantly since then . . . so that more recent analysis of voting patterns and the other Section 2 elements would be necessary to assert with any confidence that Section 2 violation might be found in a particular part of the state today." D-15 at 5. Appellants never performed such analysis with regard to CD1.

Seventh, Appellants point to two exhibits which they claim show that Representative Butterfield opposed an early version of CD1 that included fewer voters residing in counties covered by Section 5. J.S. 16. One exhibit does not concern Butterfield at all—it is a statement from Representative Watt addressing CD12, in which he explains that statements Rucho and Lewis had attributed to him were "misleading and inaccurate." D-27. The other exhibit is a news article that states that Butterfield "is taking issues with statements by redistricting leaders Sen. Rucho and Rep. Lewis about his input in the new congressional map" and quotes him as "categorically deny[ing]" statements attributed to him and stating, "I have never expressed to the Republican leadership my preference for the district." D-8 at 1. To be sure, this exhibit contains no reference to whether racially polarized voting exists in CD1.

Eighth, Appellants seek support in the fact that in two "alternative versions of CD1 proposed by opposition groups during the legislative process, African Americans represent a super majority of registered Democrats." J.S. 16. If that sounds carefully phrased, it most certainly is. Neither of these alternatives proposed creating CD1 as a majority-BVAP district. *See* D-2.62 (47.44% any part black); D-2.63 (47.82% any part black); *see also Strickland*, 556 U.S. at 22 (rejecting use of "minority voters' strength within a particular party as the proper yardstick under the first *Gingles* requirement").

Viewed with the utmost charity, all Appellants' "voluminous" evidence suggests is that the General Assembly was aware that there is some measure of racially polarized voting in the State of North Carolina as a whole, but had no indication that a white majority

in CD1 "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). This is hardly a "strong basis" in evidence for the General Assembly's asserted belief that it had to greatly increase the BVAP of a district that has long elected minority candidates of choice to avoid Section 2 liability. As the Court has already held, "simply because 'a legislature has strong basis in evidence for concluding that a § 2 violation exists [somewhere] in the State' does not permit it to 'draw a majority-minority district anywhere [in the state].'" J.S. App. 48a (quoting *Shaw II*, 517 U.S. at 916-17) (alterations in original).

The record amply supports the Panel's conclusion that the State failed to meet its strict scrutiny burden.[7]

B. *Strickland* Does Not Inoculate the Race-Based Redistricting of CD1

Appellants seek refuge in *Strickland* to justify the State's decision to draw CD1 as a majority-minority district without a "strong basis in evidence" for doing so. *See* J.S. 28 ("Here, North Carolina followed specific guidance for Section 2 districts *set by this Court*.").

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[7] Appellants contend that the Panel's decision should be "summarily reversed" because the Panel supposedly held in error that benchmark CD1 was a "white majority" district. J.S. 35-36. This not only misreads the Panel's decision, it turns that decision on its head. In the context of explaining why the State could not possibly have believed that the third prong of the *Gingles* test was established, the Panel noted that the evidence conclusively showed that a white majority did *not* vote routinely as a bloc to defeat African Americans' candidates of choice. *See* J.S. App. 49a-51a. Far from "requir[ing] reversal," J.S. 35, this analysis dooms Appellants' narrow tailoring argument, as it demonstrates that any Section 2 claim would necessarily fail.

According to Appellants, *Strickland* not only "relieves the State" from performing any analysis whatsoever of racial voting patterns when it draws majority-minority districts, *id.* at 28-29, it compels the State to draw majority-minority districts wherever possible, *id.* at 8 (*Strickland* "requires" the legislature to draw majority-minority districts to comply with Section 2 of the VRA). Appellants' misreading of *Strickland* runs deep.

In *Strickland*, a plurality of the Court held that a Section 2 plaintiff cannot satisfy the first *Gingles* precondition unless he or she establishes that it is possible to draw a reasonably compact majority-minority district. 556 U.S. at 25. "That is, section 2 does not compel the creation of crossover districts wherever possible." J.S. App. 51a n.10. This is, to state the obvious, "a far cry from saying that states must create majority-BVAP districts wherever possible," *id.*, as Appellants argue here. To the contrary, the Court has repudiated that interpretation of the VRA. *See generally Miller*, 515 U.S. 900 (rejecting the DOJ's then-existent "maximization" policy); *see also Strickland*, 556 U.S. at 16 ("[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose.") (citation omitted).

Strickland does not, as Appellants would have it, establish some kind of "safe harbor" that allows legislatures to evade constitutional scrutiny in racial gerrymandering claims. Nothing in the plurality decision in *Strickland* even suggests that the Court intended to silently overrule *Miller*'s unequivocal holding that the VRA does not require a state to pursue a "maximization" policy. And nothing in *Strickland* suggests that it dispenses with the second

and third *Gingles* factors such that a state can use VRA compliance as a defense to a racial gerrymandering claim merely upon showing that it is possible to draw a majority-minority district.

In fact, *Strickland* cautions *against* the creation of majority-minority districts where minority candidates of choice have been elected with crossover support, as has long been the case in CD1.

> Our holding . . . should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. See *Miller v. Johnson, supra*; *Shaw v. Reno, supra*. . . . Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place[.]

Strickland, 556 U.S. at 23-24 (citation omitted). Thus, a proper reading of *Strickland* would have seen it as warning that unnecessarily redrawing CD1 as a majority-minority district would violate the Court's racial gerrymandering jurisprudence, not as an invitation (let alone a command) to draw a majority-minority district simply because it was possible (albeit at the expense of traditional districting criteria). To the extent the State had any concerns about potential Section 2 claims, moreover, *Strickland* explains that "[s]tates can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts." *Id.*

at 24.[8] Accordingly, not only does Appellants' "voluminous" evidence of racially polarized voting in CD1 fall flat, *see supra* pp. 24-29, the State's failure to so much as consider the actual electoral history of this crossover district directly contradicts the case they contend compelled the creation of CD1 as a majority-minority district.

Because it misinterpreted *Strickland* in drawing the congressional map in 2011, the State turned the VRA on its head, transforming it into what amounts to a tool for perpetuating electoral racial segregation. The words of the *Strickland* Court apply with full force here:

> It would be an irony . . . if § 2 were interpreted to entrench racial differences by expanding a "statute meant to hasten the waning of racism in American politics." Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The [VRA] was passed to foster this cooperation.

556 U.S. at 25 (citation omitted). Far from "foster[ing] this cooperation," the State's race-based redistricting of CD1 ignored the electoral success of minority-preferred candidates and thwarted the goals of the VRA. This approach is hardly narrowly tailored to a compelling interest in VRA compliance.

C. Appellants Concede CD12 Fails Strict Scrutiny

The Panel's conclusion that the predominant use of race in CD12 was not narrowly tailored to a compelling

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[8] To be sure, the State can claim no compelling interest "in avoiding meritless lawsuits." *Shaw II*, 517 U.S. at 908 n.4.

government interest is not in dispute. As the Panel noted, Appellants "completely fail[ed] to provide . . . a compelling state interest for the general assembly's use of race in drawing CD12." J.S. 44a-45a. Appellants do not challenge the Panel's strict scrutiny analysis for CD12 on appeal. Thus, if the Panel's factual determination that race predominated in CD12 is not clearly erroneous, Appellants concede the district fails strict scrutiny.

III. APPELLEES' CLAIMS ARE NOT BARRED

At the end of their Jurisdictional Statement, in a footnote disconnected from the surrounding text and devoid of any record citation, *see* J.S. 36 n.11, Appellants argue briefly and half-heartedly that Appellees' claims are barred by res judicata and collateral estoppel and thus the Panel lacked authority to even reach the merits of Appellants' claims. The Court should summarily reject this conclusory and obviously after-thought argument advanced in a footnote. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, J., concurring); *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 223-24 (1997) (declining to decide question that received only "scant argumentation").

The Panel considered and denied Appellants' motion for summary judgment on these grounds more than a year before trial (*see* ECF Nos. 74, 85), and Appellants failed to present any further evidence at trial in support of their estoppel defenses, let alone appeal that decision.

The Panel rejected the argument because it is spurious. Appellees were not parties to the state court litigation, did not authorize any party to that case to act on their behalf, and, indeed, were not even aware

a state court case existed at the time they filed this lawsuit. *See generally* ECF No. 78 (Plaintiffs' Memo. in Opp. to Defendants' Mot. for Summ. J.). Moreover, the state court plaintiffs are not plaintiffs in this case and have no ability to control this matter. *See id.* Appellants' claim preclusion arguments fail.

CONCLUSION

Appellees respectfully submit that the judgment of the three-judge panel should be summarily affirmed.

Respectfully submitted,

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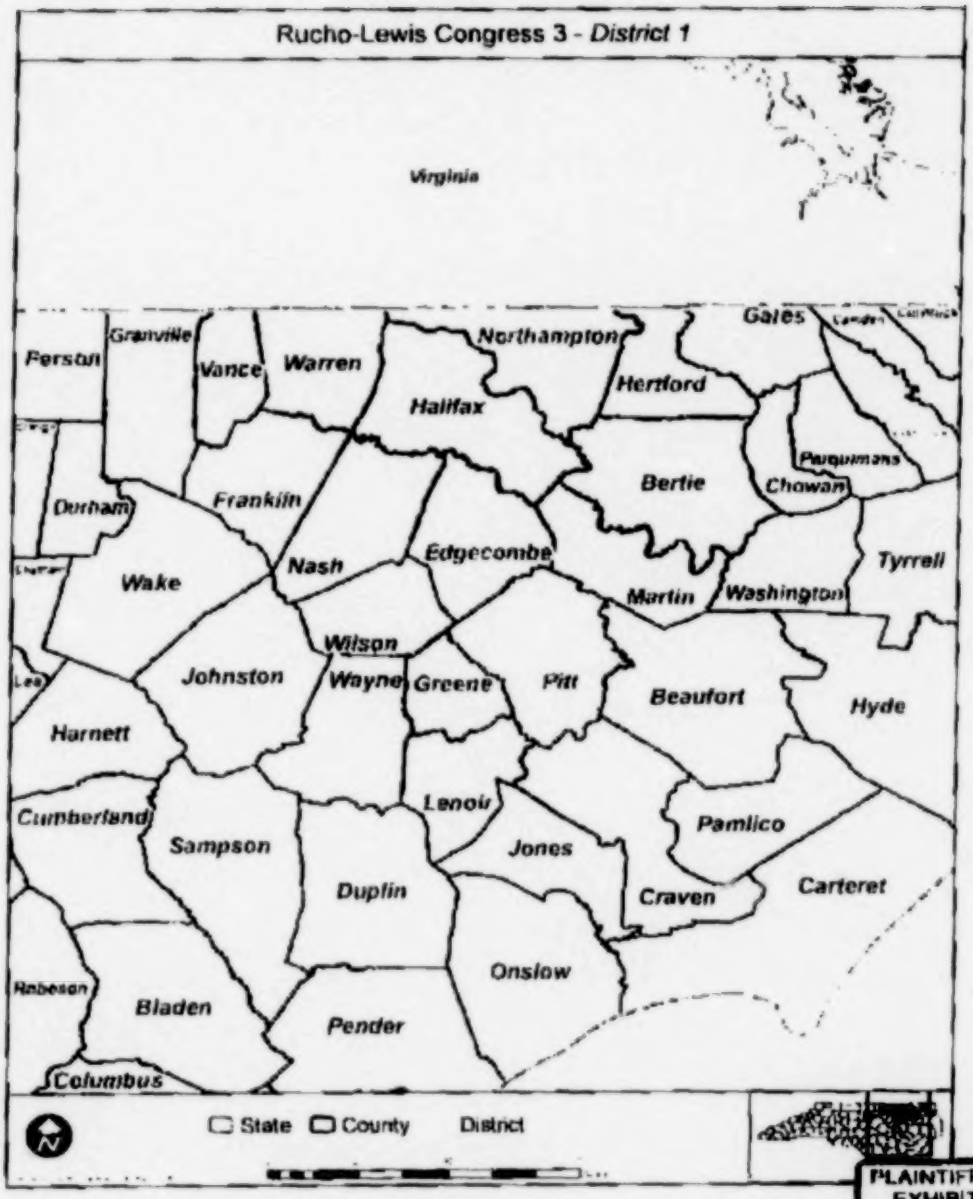
APPENDIX

APPENDIX A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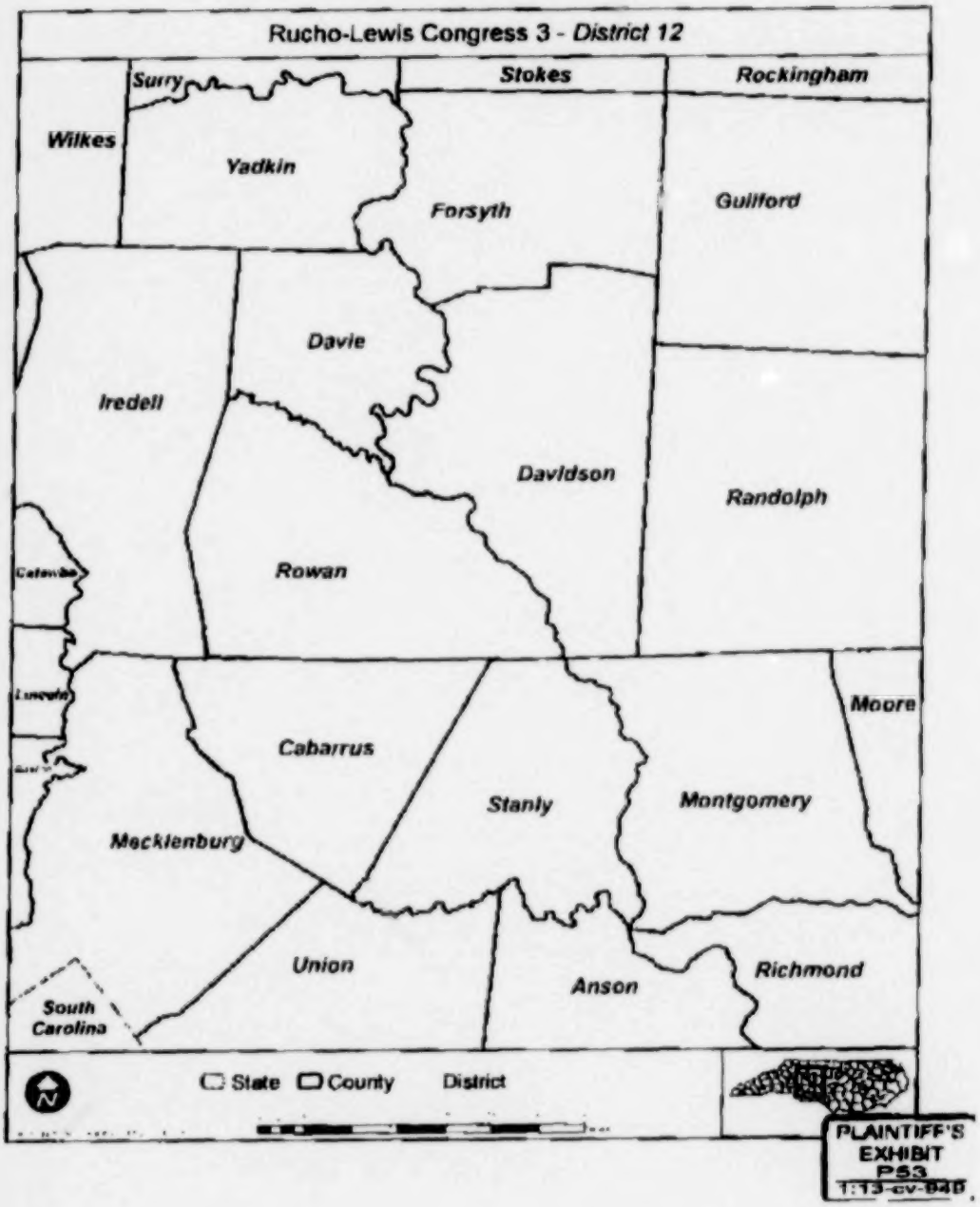
APPENDIX B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